

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
PRACTICE COURT

Not Restricted

No. 2170 of 2010

KIMBERLEY CASTLES

Plaintiff

v

SECRETARY OF THE DEPARTMENT OF
JUSTICE & ORS

Defendant

<u>JUDGE:</u>	OSBORN J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	30 April 2010
<u>DATE OF JUDGMENT:</u>	4 May 2010
<u>CASE MAY BE CITED AS:</u>	Castles v Secretary of the Department of Justice & Ors
<u>MEDIUM NEUTRAL CITATION:</u>	[2010] VSC 181

ADMINISTRATIVE LAW – Application for interlocutory injunction – Prisoner seeking permit from prison authority to attend clinic for IVF treatment – Triable issues as to the interpretation of s 47(1) Corrections Act 1986 and the application of the Charter of Human Rights and Responsibilities Act 2006 – Power constrained in s 57D of the Corrections Act 1986 – Decision of Secretary – Balance of convenience - Injunction compelling decision in favour of plaintiff refused – Order for speedy trial.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr R Merkel QC with Mr M Borsky	Blake Dawson
For the Defendant	Mr R Niall with Ms K Walker	Victorian Government Solicitors
For the Intervenor	Ms C Melis	Victorian Equal Opportunity and Human Rights Commission

HIS HONOUR:

- 1 The plaintiff is a 45 year old woman currently held as a low security prisoner at Tarrengower Prison near Maldon. In November 2009 she was sentenced to three years imprisonment, with a non-parole period of 18 months in respect of Centrelink fraud offences. She will be released on recognisance on 19 May 2011 and will be eligible for home detention from 19 November 2010.
- 2 Tarrengower is a minimum security women's prison. It accommodates women who are nearing the end of their sentence and have a low security rating. It is operated with an emphasis on preparation for release and community integration. It has 10 self-contained units, in one of which the plaintiff has lived with her two year old daughter since January 2010.
- 3 Although the plaintiff has both a 27 year old and two year old daughter, she has had difficulty conceiving a further child. Both she and her partner (who is the father of her younger daughter) desire to have such a child.
- 4 In mid 2008 the plaintiff began a course of in vitro fertilisation ('IVF') treatment with Dr Tsaltas of the East Melbourne IVF Clinic ('the Clinic'). That course was interrupted by her imprisonment and she will become ineligible to receive further treatment when she turns 46 on 9 December 2010.
- 5 She has also been advised that as each month passes her chances of successful IVF treatment diminish.
- 6 As a result of her imprisonment the plaintiff is in the legal custody of the first defendant ('the Secretary') pursuant to s 6A of the Corrections Act 1986 ('the Corrections Act'). In consequence of ss 6 and 6A of the Corrections Act she is confined to prison subject to the provisions of that Act. Part 8 of the Corrections Act nevertheless provides for temporary absences from prison and in particular provides for what are called custodial community permits, which include corrections administration permits issued for a purpose related to the health of the prisoner.

- 7 In addition s 47(1)(f) of the Corrections Act gives every prisoner the following right:
- the right to have access to reasonable medical care and treatment necessary for the preservation of health including, with the approval of the principal medical officer but at the prisoner's own expense, a private registered medical practitioner physiotherapist or chiropractor chosen by the prisoner;
- 8 The plaintiff has requested permission under the provisions of the Corrections Act to attend the Clinic at her own expense, but has hitherto failed to obtain that permission.
- 9 She now seeks an injunction restraining the defendants until the hearing and determination of this proceeding or until further order, from continuing to neglect, fail or refuse to grant the permits and approvals necessary to allow the plaintiff to have access to treatment from Dr Tsaltas as the Clinic. It can be seen that in substance the relief sought is in the nature of mandamus.
- 10 The defendants do not contest that s 57A of the Corrections Act would enable the Secretary to issue a permit for leave from prison for the purposes of IVF treatment.
- 11 Nor when the matter came on for hearing was it contested that the plaintiff was entitled to have the application she has made considered and determined by reference to relevant considerations.
- 12 Section 57D of the Corrections Act provides:
- (1) The Secretary may only issue a custodial community permit to a prisoner if the Secretary is satisfied that—
 - (a) adequate consideration has been given to the safety and welfare of the prisoner and members of the public; and
 - (b) facilities exist for the provision of adequate and suitable escort and transport where necessary; and
 - (c) in addition to the requirements of this Division, the issuing of the permit complies with any requirements set out in the regulations.
 - (2) In issuing a custodial community permit, the Secretary—
 - (a) must comply with any requirements set out in the regulations; and

- (b) may impose any conditions on the permit that he or she thinks are appropriate.

13 In turn reg 48 of the Corrections Regulations 2009 provides:

The Secretary may issue a custodial community permit if he or she is satisfied that—

- (a) the purpose for which the application is made is a purpose under section 57(1) of the Act;¹ and
- (b) adequate consideration has been given to the safety and welfare of the prisoner and members of the public; and
- (c) facilities exist for the provision of adequate and suitable escort and transport where necessary.

14 On the hearing of the application the defendants contended that the injunctions should be refused because:

- (a) the plaintiff is not presently entitled to receive IVF treatment because she does not have the necessary criminal record check and child protection order check documentation required by ss 10 and 14 of the Assisted Reproductive Treatment Act 2008 ('the ART Act');²

¹ The reference to s 57(1) should be understood as a reference to s 57A(1).

² Sections 10(1) and (2), and 14 of the ART Act provide:

10 Persons who may undergo treatment procedures

(1) A woman may undergo a treatment procedure only if—

- (a) the woman and her partner, if any, have consented, in the prescribed form, to the carrying out of a procedure of that kind; and
- (b) either—
 - (i) the criteria in subsection (2) apply to the woman; or
 - (ii) the Patient Review Panel has decided there is no barrier to the woman undergoing a treatment procedure of that kind.

(2) For subsection (1)(b)(i), the criteria applicable to a woman are—

- (a) a doctor is satisfied, on reasonable grounds, that—
 - (i) in the woman's circumstances, the woman is unlikely to become pregnant other than by a treatment procedure; or
 - (ii) the woman is unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure; or
 - (iii) the woman is at risk of transmitting a genetic abnormality or genetic disease to a child born as a result of a pregnancy conceived other than by a treatment procedure, including a genetic abnormality or genetic disease for which the woman's partner is the carrier; and
- (b) a presumption against treatment does not apply to the woman.

...

14 Presumption against treatment

(1) This section applies if—

- (a) a criminal record check specifies that—

- (b) the discretion to grant a permit is vested in the Secretary subject to the conditions set out in s 57D and it is submitted the best the plaintiff could obtain would be an order requiring a lawful exercise of the discretion under s 57A; and
- (c) the defendants should not be required to give multiple approvals in advance regardless of the particular circumstances that might exist at the relevant time. The balance of convenience which is heavily influenced by the statutory scheme, favours the ability of the prison authorities to make prison management decisions free from the constraints of a mandatory injunction, granted in relation to a particular prisoner in respect of dates that are currently unknown and cannot be precisely predicted.

15 The plaintiff makes her application within a matrix of circumstances which include the following elements:

- she has made (without incident) approximately 24 accompanied visits outside the prison and for up to eight hours at a time;
- these include visits to the doctor and optometrist;
- she has been on an unaccompanied visit to a local fire station to participate in community work;
- as a low security prisoner she is entitled to and has received conjugal visits;
- in addition low security prisoners at Tarrengower are generally permitted to undertake accompanied visits to their homes every four weeks;

-
- (i) charges have been proven against a woman or her partner for a sexual offence referred to in clause 1 of Schedule 1 to the Sentencing Act 1991; or
 - (ii) the woman or her partner has been convicted of a violent offence referred to in clause 2 of Schedule 1 to the Sentencing Act 1991; or
 - (b) a child protection order check specifies that a child protection order has been made removing a child from the custody or guardianship of the woman or her partner.
 - (2) A presumption against providing a treatment procedure applies to the woman.
 - (3) If, under subsection (2), a presumption against providing a treatment procedure applies to a woman a registered ART provider must not provide a treatment procedure to the woman.

- inmates can and do fall pregnant during the period of their imprisonment at Tarrengower. Four have had babies this year;
- the plaintiff's treatment must begin on the second day of her menstrual cycle. Her next cycle begins on 12 May 2010;
- the proposed treatment would commence with the use of a spray and daily injections, which could occur at Tarrengower;
- approximately 10 days later she would be required to attend the clinic to have her eggs counted;
- approximately a week later she must attend the clinic to have eggs extracted. This procedure takes a few hours and involves the use of an anaesthetic;
- two days later she must attend the clinic to have the fertilised eggs injected into her womb;
- in total she needs to attend the clinic three times per cycle.

16 The plaintiff requested approval to obtain IVF treatment by letters dated 27 November 2009, 11 December 2009, 17 December 2009, 22 December 2009 and 26 December 2009 to one or other of the defendants. On 8 January 2010 she completed a formal application for permission to attend the clinic and provided it to medical staff at Dame Phyllis Frost Centre ('DPFC'). She received no response to any of her requests and sought legal assistance from the Human Rights Law Resource Centre ('HRLRC').

17 Requests were made on her behalf on 27 January 2010 and 9 February 2010. On 11 February 2010 the second defendant wrote requesting further information in order to consider the plaintiff's request.

- Evidence that Ms Castles meets the eligibility criteria contained in the Assisted Reproductive Treatment Act 2008, which is now in force. Preferably this should be by way of confirmation from Ms Castles' ART provider that it has sighted the relevant criminal checks and child protection order

checks for Ms Castles and her partner, and that the presumption of ineligibility does not apply. I note that the Melbourne IVF Clinic, which Ms Castles has told us is her ART provider, has extensive information on their website about how to proceed with the necessary checks and that they expect both new and existing patients to undertake [sic] the checks.

- Detailed information from Ms Castles' ART provider about what the treatment is likely to involve. This information is needed in order for me to assess the security and other implications of Ms Castles' request. At minimum, I require:
 - Confirmation of the view expressed by Ms Castles that the treatment will involve three visits to the ART provider, as well as identification of any contingencies that may affect the accuracy of this projection;
 - An explanation from the ART provider of the likely length of the three visits and what each is likely to involve;
 - Confirmation from the ART provider that it would be possible for a security guard to be present with Ms Castles at all times (as well as confirmation from Ms Castles that she would consent to this);
 - Information as to what the treatment will involve outside of the three visits to the clinic, for example, whether additional blood tests will be required; and what drugs will need to be administered, in what form, and at what times;
 - Full information as to any medical risks associated with the treatment;
 - Information as to whether the treatment will only involve one cycle of implantation or whether there are sufficient embryos to invite the possibility of further treatment in subsequent months should the first treatment be unsuccessful;
 - An explanation of the level of risk of a multiple pregnancy resulting from the intended course of treatment, including an indication of how many embryos it is intended to implant.
- An assessment from Ms Castles' ART provider of the clinical implications if the treatment were to be delayed:
 - until Ms Castles' release date in May 2011; or
 - for around seven months (so that the baby was not born until after Ms Castles has been released from prison).

Please provide a clinical evaluation of each of these eventualities.

- A medical evaluation of any particular risks associated with a pregnancy for Ms Castles (bearing in mind her age, her previous miscarriage and the likelihood, if any, of a multiple pregnancy) and the implications of any such risks for the management of the pregnancy.

- Information as to what children Ms Castles already has, their ages and whether she is their biological mother.
- Information concerning Ms Castles' intentions respecting the care of any child or children born while she is in prison. Does she anticipate that she would apply to have any such child or children with her while she is in prison? [Ms Castles currently has an application being considered to have her two year old child with her in prison. Is it Ms Castles' expectation that she would be able to have both children with her? If it were not possible for Ms Castles to have either or both children with her in prison, what arrangements would she be able to put in place for their care pending her release from prison?]
- An explanation of Ms Castles' domestic situation. Was Ms Castles living with the intended father of the new child prior to her imprisonment? Does she anticipate that she will be living with the intended father on her release? What are the likely arrangements for the on going care of the child or children?
- In Ms Castles' letter dated 22 December 2009, she says that she paid all the money she appropriated back to Centrelink, together with interest. Please provide confirmation and proof of this. Please also provide confirmation that Ms Castles has complied with any further monetary component of the sentence or an explanation as to the arrangements that have been put in place to do so.
- Any other information that Ms Castles considers relevant to the circumstances of herself or her partner that would support her request for Justice Health to facilitate her treatment.
- Finally, under s 47(1)(f) of the Corrections Act 1986 all costs associated with an application to treatment by a private practitioner is at the prisoner's own expense. This includes costs incurred for the consultation and any subsequent treatment and medication as well as the cost of security arrangements. I note that, given that Ms Castles is not eligible for Medicare, she will presumably also be funding the cost of the IVF treatment. Please provide confirmation that Ms Castles understands this requirement and that she [is] in a position to meet those costs.³

18 The HRLRC responded on 12 February 2010 that it would provide the information sought to the extent possible but went on to state:

... much of the information you have requested, is in our opinion, irrelevant to your consideration of whether or not to grant Ms Castles' application. In the interests of expediency, we will provide this information to the extent possible. However we emphasise that the question for Justice Health is not whether Ms Castles is entitled to conceive a child or her qualities as a parent.

19 On 16 February 2010 the second defendant replied asserting that in her view each of

³ Exhibit 'RB3' to the affidavit of Rachel Ball sworn 23 April 2010.

the following considerations was relevant to a decision on the plaintiff's application:

- (1) Ms Castles' eligibility for IVF treatment;
- (2) the likely significance to Ms Castles if her request is denied;
- (3) the extent of the costs and security implications to the State;
- (4) the practicality of managing the IVF treatment, any resulting pregnancy, and the care of any resulting infant in prison;
- (5) the broader implications for public confidence in the Justice Health System.

20 On 19 February 2010 the HRLRC advised that the check process required under the ART Act was being completed. It enclosed a letter from Dr Tsaltas relating to the proposed IVF treatment. It outlined the plaintiff's family situation and detailed her financial situation (including the fact that she had repaid her Centrelink debt with interest).

21 In late February 2010 the HRLRC was advised by the second defendant that a response would soon be given.

22 On 1 March 2010 the HRLRC sent a letter to Justice Health foreshadowing an application to the Court if no response were made.

23 On 2 March 2010 the second defendant sought further clarification of the IVF procedures contemplated.

24 The details sought were provided by letter the following day.

25 Correspondence seeking a decision then continued and on 11 March 2010 the HRLRC then sent a detailed memo to the second defendant concerning the case for the plaintiff.

26 On 18 March 2010 the second defendant advised the HRLRC that there were three outstanding issues:

- (a) the status of the requirement concerning criminal record checks;
- (b) the need for the plaintiff to obtain a security clearance; and
- (c) the capacity of Tarrengower to provide appropriate medical facilities to support the proposed IVF treatment.

27 Application has since been made for the relevant checks, but no response has yet been received. (An application made in late March was rejected as formally inadequate and a further application was made on 14 April 2010).

28 No subsequent decision was made prior to the issue of these proceedings and the hearing on Friday last.

29 A report has been obtained from Professor Burrows which expresses the opinion:

It would appear that Miss Castles is very distressed about her inability to complete the IVF program and no doubt she will continue to have ongoing emotional problems.

30 The plaintiff's case for an injunction is put on the basis that she has an enforceable right to IVF treatment.

31 That right is said to be founded upon the provisions of the Corrections Act, the Charter of Human Rights and Responsibilities Act 2006 ('the Charter'), the common law duty owed to her as a prisoner, and fiduciary duties owed to her as a prisoner.

32 The defendants concede that there is a serious issue to be tried in respect of the rights asserted, at least with respect to the first two bases on which rights are asserted.

33 This is not to say that the rights claimed are conceded.

34 The plaintiff's case does not plainly fall within s 47(1)(f) of the Corrections Act but the interpretation of that provision must be undertaken in conjunction with the provisions of the Charter.⁴ Further its application will involve questions of evidence.

⁴ The Queen v Momcilovic [2010] VSCA 50, [35], [101]-[110].

The plaintiff contends that the treatment is necessary for both her reproductive and mental health, but the factual foundation of these contentions is in issue.

35 Likewise there is dispute as to the ambit of the rights asserted by the plaintiff under the Charter. The plaintiff contends that the defendants must give proper consideration to relevant human rights and must not act incompatibly with those human rights.⁵ The defendants contend that in effect the plaintiff asserts a right to found a family, which is not a right for which the Charter provides. They take issue with the plaintiff's contentions in respect of s 13(a) (privacy and family), s 8 (equality and freedom from discrimination), s 22 (humane treatment), and s 17 (protection of family and children).

36 Further, s 38(1) of the Charter is itself the subject of a proviso:

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

37 I accept the defendants' submission that the further claims made by reference to duty of care and fiduciary duty are inherently problematic.

38 It follows that the nature of the plaintiff's right to IVF treatment (if any) under the Corrections Act or the Charter may ultimately be central to the resolution of this proceeding. Nevertheless the present situation is that the Secretary has indicated no unwillingness in principle to exercise the power to grant a permit to access IVF treatment, because of its medical character.

39 The matters which were raised in correspondence by the second defendant, and

⁵ She relies on *Director of Housing v Sudi* [2010] VCAT 328, [24]-[25].

which were pursued before me, are other practical considerations. In this regard, the defendants rely on the affidavit of Brendan Money who is the general manager of the DPFC and Tarrengower Prisons. He deposes that in order for the plaintiff to access IVF at the Clinic, it would be necessary to transfer her back from Tarrengower to DPFC. Operational decisions would then have to be made in the context of a maximum security prison.

40 He maintains further that it will be difficult to guarantee the plaintiff's attendance at the Clinic on particular dates on an extended basis, because of the overall operational needs and potential constraints of the prison (including the need to respond to emergencies).

41 The defendants are required to operate the prison having regard to a public interest which is broader than recognition of the plaintiff's rights. There is nothing inherently improbable in the proposition that operational constraints may materially affect the capacity to provide the sequential permits which the plaintiff seeks.

42 I should add that the requirement to move the plaintiff to DPFC is acceptable to the plaintiff. Further the plaintiff accepts that she will have to meet the operational requirements of the prison in attending the Clinic. Nevertheless for present purposes the statutory framework (which emphasises matters of safety and security) compels me to accept the defendant's case that operational issues may not merely constrain, but may in fact preclude the grant of a permit if circumstances so require.

43 In particular s 57D of the Corrections Act conditions the power to grant a permit upon satisfaction by the Secretary that facilities exist for the provision of adequate and suitable escort and transport where necessary.

44 Having regard to the evidence of Mr Money, the Secretary might take the view such satisfaction cannot be reached in advance with respect to sequential extended leave of the type the plaintiff seeks.

45 Alternatively on the evidence before the Court (as the plaintiff submitted)⁶ she might take the view that the operational difficulties are capable of resolution if approval were granted subject to a condition that arrangements be made to the satisfaction of the prison governor for matters such as the provision of suitable escort and transport.

46 In the event after the hearing of the application before the Court last Friday (and without prior notice of intention to do so), the Secretary determined on Monday 3 May 2010, not to grant the approval sought. The Victorian Government Solicitor has advised the Court:

The plaintiff had requested the Secretary agree to grant her a corrections administration permit under s 57A(1)(a) of the Corrections Act 1986 to allow the plaintiff to leave prison regularly for the purpose of IVF treatment.

I am writing to inform the Court that, today (3 May 2010), the Secretary to the Department of Justice, Ms Penny Armytage, decided not to grant the plaintiff a corrections administration permit.

47 The Secretary's decision may be regarded at least in part, as responsive to the submission of Senior Counsel for the plaintiff last Friday that, 'if the logistical difficulties were serious difficulties or honest difficulties, they would have refused the application ...'⁷

48 The refusal may also be regarded as responsive to questions from the Bench as to when the plaintiff might expect the application to be resolved.⁸

49 Subsequently the Victorian Government Solicitor further advised the Court:

The letter was not intended to provide any additional basis for resisting the injunction sought by the plaintiff. It is not contended that the information in the letter is relevant to any of the issues raised and argued in the interlocutory injunction application.

50 In my view on the evidence presently available, the decision made was open to the Secretary for the reasons I have stated. Further the Secretary should (in the absence

⁶ TP65.

⁷ TP9, 14-15, 24, and 59.

⁸ TP2, 44, 47 and 48.

of contrary evidence) be presumed to know the operational resources of her department. I accept Mr Niall's submission that the relevant discretionary judgment is one which potentially takes into account the duties of the Secretary to other prisoners, members of the public and staff.⁹

51 In *Cameron v Nova Scotia*,¹⁰ one of the authorities relied on by the plaintiff, Chipman JA stated in the leading judgment relating to a claim in which the plaintiffs asserted that a refusal to provide health benefits for IVF treatment was in breach of the Canadian Charter of Rights and Freedom:

[236] The policy makers require latitude in balancing competing interests in the constrained financial environment. We are simply not equipped to sort out the priorities. We should not second guess them, except in clear cases of failure on their part to properly balance the Charter Rights of individuals against the overall pressing objective of the scheme under the Act.

[237] To use the words of Sopinka, J in *Egan*, supra 'it would be unrealistic' for this Court to assume that there are unlimited funds to address the needs of all. We must necessarily show considerable deference to the decision makers in this exercise.

52 I am likewise of the view that I should not (at this stage of the proceeding) second guess the prison authorities except in a clear case of failure to balance the plaintiff's rights against the overall objectives of the Corrections Act. More particularly, I should not second guess the Secretary's exercise of discretion in circumstances where it appears to me on the evidence that it was open to her to fail to be satisfied of the preconditions specified by s 57D, and she is in a position to assess operational issues, which the Court is not.

53 I return then to the question of eligibility under the ART Act. I do not accept the submissions made on behalf of the plaintiff, that s 10(2)(b) of the ART Act requires a doctor to be satisfied a presumption against treatment as provided for in s 14 does not apply. Section 2(a) sets out the matters of which a doctor must be satisfied. Section 10(2)(b) operates independently of such satisfaction.

⁹ TP42.

¹⁰ (1999) NSJ No. 297.

- 54 Nevertheless I accept that it would be open to this Court to grant an injunction conditional upon compliance with ss 10 and 14 of the ART Act. The ultimate question is whether the Court should do so.
- 55 Before granting an interlocutory injunction the Court needs to be satisfied that there is a serious issue to be tried and that the balance of convenience favours the grant of the injunction.¹¹ The Court should take the course which appears to carry the lower risk of injustice, should it turn out to have been wrong.
- 56 The requisite strength of the probability of ultimate success, depends on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.¹²
- 57 A material contextual circumstance is the question of delay until final hearing of the proceeding. In my view the matter is deserving of expedition and should be brought on for hearing within one month.
- 58 I have come to the conclusion an interlocutory injunction should not be granted:
- (1) The Secretary has accepted that the plaintiff is entitled to determination of her application for permit in accordance with law and the defendants have identified specific factual considerations properly regarded as relevant to the exercise of that discretion.
 - (2) The plaintiff is not presently legally entitled to IVF treatment under the ART Act.
 - (3) The operational considerations raised by Mr Money are matters which go to matters of serious public importance, namely the provision of adequate facilities as required by s 57D(1) of the Corrections Act in the context of the overall safe and proper management of the prison system.

¹¹ Bradto Pty Ltd v State of Victoria (2006) 15 VR 65, 73, [35].

¹² Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, 84, [71].

- (4) On their face these considerations fall within the category of matters comprehended by s 38(2) of the Charter.
- (5) Neither the decision to grant a permit nor the discretion to impose appropriate conditions is vested in this Court, but both are vested in the Secretary.
- (6) On the material before me, the case that the Secretary was bound to make a decision contrary to that which she has made, is weak.
- (7) A speedy trial of the matter can be fixed and liberty to apply can be reserved to the parties.

59 Subject to further submissions as to the form of order, I propose to order:

- (1) This matter be fixed for trial on 1 June 2010 with an estimate of three days.
- (2) The defendants file and serve a defence within 14 days.
- (3) Subject to further order of the trial judge, the trial proceed by way of affidavit and each party file and serve any further affidavit material upon which they intend to rely within 21 days.
- (4) Liberty to apply be reserved.
- (5) Costs be reserved.

60 I understand that the course I have adopted carries with it the risk that the plaintiff may have to forego treatment in conjunction with her next menstrual cycle.

61 Nevertheless it cannot be said she will be entitled to receive such treatment under the ART Act in any event and the course with the lowest risk of injustice, is that which seeks to resolve her position with maximum expedition, within the statutory and operational framework of the corrections system.

62 Lastly, I should record that the reasons for non-acceptability of the plaintiff's

application which were advanced to this Court would not preclude the making of a more limited and specific application once the check requirements of the ART Act are met.

SCHEDULE OF PARTIES

No. 2170 of 2010

BETWEEN:

KIMBERLEY CASTLES

Plaintiff

- and -

SECRETARY OF THE DEPARTMENT OF JUSTICE

Firstnamed Defendant

MICHELE GARDNER

Secondnamed Defendant

JOE HOVELL

Thirdnamed Defendant

MANDY SMITH

Fourthnamed Defendant

CERTIFICATE

I certify that this and the 16 preceding pages are a true copy of the reasons for Judgment of Justice Osborn of the Supreme Court of Victoria delivered on 4 May 2010.

DATED this fourth day of May 2010.

.....
Associate